

**UNITED STATES ENVIRONMENTAL PROTECTION AGENCY**

**REGION 8**

**999 18<sup>TH</sup> STREET- SUITE 300**

**DENVER, CO 80202-2466**

**Phone 800-227-8917**

**<http://www.epa.gov/region08>**

**DOCKET NO.: CWA-08-2006-0029**

IN THE MATTER OF:

**GOSNEY and SONS, INC.**

**Bayfield Pit**

Bayfield, CO

RESPONDENT

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**FINAL ORDER**

Pursuant to 40 C.F.R. §22.18, of EPA's Consolidated Rules of Practice, the Consent Agreement resolving this matter is hereby approved and incorporated by reference into this Final Order. The Respondents are hereby **ORDERED** to comply with all of the terms of the Consent Agreement, effective immediately upon receipt by Respondents of this Consent Agreement and Final Order.

**8 August '06**  
DATE

**SIGNED**  
Robert E. Roberts  
Regional Administrator

**UNITED STATES ENVIRONMENTAL PROTECTION AGENCY**

**REGION VIII**

**Docket No. CWA-08-2006-0029**

**IN THE MATTER OF:**

Gosney and Sons, Inc.  
Grove Pit  
Bayfield, CO

**Respondent**

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**Complaint and  
Consent Agreement**

Complainant, United States Environmental Protection Agency, Region 8 (“EPA”), and the Gosney and Sons, Inc. (“Respondent”), by their undersigned representatives, hereby consent and agree as follows:

**Introduction**

1. The Administrator of the EPA has determined that an administrative penalty action is appropriate for the violations alleged below.
2. This matter is governed by the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties set forth at 40 C.F.R. Part 22.
3. Therefore, EPA has jurisdiction over this matter pursuant to section 309(g) of the Clean Water Act (“CWA” or “the Act”), 33 U.S.C. § 1319(g), and is authorized to issue civil administrative complaints and assess civil penalties for violations of the CWA.

4. EPA and the Respondent (collectively referred to as the “parties”) have agreed to the settlement of this matter before the filing of a complaint as authorized by 40 C.F.R. § 22.13(b), and to execute this Complaint and Consent Agreement pursuant to 40 C.F.R. § 22.18(b)(2) and (3) for the purpose of simultaneously commencing and concluding this matter upon the issuance of a Final Order.

### **Allegations**

5. Respondent is a corporation organized and existing under the laws of the State of Colorado, with its principal place of business at 6699 County Road 521, Bayfield, Colorado, 81122.

6. Respondent is therefore a “person” as that term is defined in section 502(5) of Act, 33 U.S.C. § 1362(5).

7. Respondent is the owner and/or operator of the Grove Pit sand and gravel operation in Bayfield, Colorado as defined in 40 C.F.R. § 122.2.

8. To restore and maintain the integrity of the nation=s water, section 301(a) of the Act, 33 U.S.C. § 1311(a), prohibits the discharge of pollutants into navigable waters of the United States, unless in compliance with a permit issued pursuant to the Act.

9. Section 402 of the Act, 33 U.S.C. § 1342, establishes a National Pollutant Discharge Elimination System (NPDES) program, administered by EPA, to permit discharges into navigable waters, subject to specific terms and conditions.

10. Section 402(p) of the Act, 33 U.S.C. § 1342(p), requires that any discharge of storm water associated with an industrial activity must comply with the requirements of a NPDES permit.

11. Section 308(a) of the Act, 33 U.S.C. § 1318(a), requires the owner or operator of any point source to provide such information as required under section 402(p) of the Act, 33 U.S.C. § 1342(p).

12. As directed by section 402(p) of the act, 33 U.S.C. § 1342(p), EPA has issued regulations that further define requirements for NPDES permits for storm water discharges. The regulations include those codified at 40 C.F.R. §§ 122.21 and 122.26.

13. The term “navigable waters” is defined as the waters of the United States, according to section 502(7) of the Act, 33 U.S.C. § 1362(7).

14. The term “waters of the United States” is defined under 40 C.F.R. § 122.2 to include various types of waters including, but not limited to, interstate waters, their tributaries, and wetlands adjacent to either interstate waters or their tributaries.

15. The term “discharge” as well as the term “discharge of a pollutant,” are defined in section 502(12) of the Act, 33 U.S.C. § 1362(12), and 40 C.F.R. § 122.2 to include any addition of any pollutant to navigable waters from any point source.

16. The term “pollutant” includes rock, sand, and industrial waste discharged into water, according to section 502(6) of the Act, 33 U.S.C. § 1362(6), and 40 C.F.R. § 122.2.

17. The term “storm water” means storm water runoff, snow melt runoff, and surface runoff and drainage as defined at 40 C.F.R. § 122.26(b)(13).

18. Storm water contains “pollutants” as defined by section 502(6) the Act, 33 U.S.C. § 1362(6).

19. Section 301 of the Act, 33 U.S.C. § 1311, prohibits the discharge of pollutants to waters of the US except under certain provisions including section 402 of the Act, 33 U.S.C. § 1342.

20. Under 40 C.F.R. § 122.21(a), any person who discharges must submit a complete application for an NPDES permit to the Director in accordance with this section.

21. Under 40 C.F.R. § 122.26(c), any person who discharges storm water associated with industrial activity is required to apply for an individual permit or seek coverage under a promulgated storm water general permit.

22. Sand and gravel operations are point source activities covered under the mineral and mining category at 40 C.F.R. Part 436 Subpart C and therefore subject to the NPDES requirements including obtaining a permit prior to operations under 40 C.F.R. § 122.21(g).

23. The storm water permit requirements for sand and gravel operations are outlined in Sector J, Mineral Mining and Dressing, Multi-Sector General Permit (MSGP) for Industrial Activities. The requirements include, among other things, the development of a storm water pollution prevention plan (SWPPP) and the implementation of best management practices (BMPs). 65 FR 64746, October 30, 2000.

24. Respondent described its nature of business at the Grove Pit as sand and gravel mining in its permit application dated November 23, 2004.

25. On September 14, 2004, EPA representatives conducted an inspection of Respondent's facility located at County Road 521 and County Road 524, Bayfield, Colorado.

26. On the date of the inspection, the EPA representatives observed a channeled flow at the eastern boundary of the Grove Pit to Beaver Creek. No NPDES or storm water permits were available for review.

27. The channeled flow is described as:

Outfall 001:The discharge serving the mining and gravel wash operations and site storm water runoff that flows into Beaver Creek at the bottom eastern boundary of Grove Pit.

28. On the date of the inspection, the EPA representatives observed no or inadequate BMPs to control sediment, erosion runoff or industrial waste (petroleum products and portable toilet waste) within the facility's operation.

29. On January 11, 2005, EPA sent an information request to Respondent pursuant to section 308 of the Act, 33 U.S.C. § 1318. The purpose of the letter was to obtain information to determine if Respondent was in compliance with the Act.

30. Respondent's February 17, 2005 section 308 Response contained a photograph confirming the discharge from Grove Pit to Beaver Creek.

31. Respondent's February 17, 2005 section 308 Response indicated that an NDPES and storm water permit had not been obtained for the Grove Pit.

32. Respondent's February 17, 2005 section 308 Response contained the NPDES and storm water permit applications for the Grove Pit.

33. Respondent's February 17, 2005 section 308 Response contained an incomplete Storm Water Pollution Prevention Plan (SWPPP) for the Grove Pit. The SWPPP was dated

February 4, 2005 and is a requirement of the storm water permit application. A completed SWPPP has since been completed and submitted by the Respondent

34. Respondent was engaged in an “industrial activity” as defined at 40 C.F.R. § 122.26(b)(14).

35. Beaver Creek is a perennial stream that flows to the Los Pinos River. Beaver Creek flows north to south adjacent to the eastern border of Grove Pit.

36. Beaver Creek is a “navigable water” and a “water of the United States” as those terms are defined in section 502(7) of the Act, 33 U.S.C. § 1362(7), and 40 C.F.R. § 122.2.

37. The Los Pinos River is a “navigable water” and a “water of the United States” as those terms are defined in section 502(7) of the Act, 33 U.S.C. § 1362(7), and 40 C.F.R. § 122.2.

38. The NPDES permitting agency for Indian Country, which includes all areas within the exterior boundaries of the Southern Ute Reservation, is the Environmental Protection Agency (EPA). See 40 C.F.R. § 123.1(h).

39. The EPA has not issued an NPDES permit for the Respondent’s Grove Pit.

40. The Respondent was in violation of section 301 of the Act, 33 U.S.C. § 1311, in that the Respondent discharged pollutants without an NPDES and storm water permit.

41. Respondent’s failure to apply for an NPDES and storm water permit for the Grove Pit from March 2003 to February 3, 2005 under 40 C.F.R. § 122.21(a)(1) and 40 C.F.R. § 122.26(c), violate sections 301(a), 308, and 402(p) of the Act, 33 U.S.C. §§ 1311(a), 1318, and 1342(p).

42. Respondent has informed EPA that it has ceased operation at Grove Pit as of February 28, 2006 and has stated it is no longer discharging pollutants to Beaver Creek.

### **Settlement**

43. Respondent admits the jurisdictional allegations contained herein and neither admits nor denies the specific factual allegations and violations alleged herein.

44. Respondent waives the right to a hearing before any tribunal, to contest any issue of law or fact set forth in this Complaint and Consent Agreement.

45. Complainant asserts that settlement of this matter is in the public interest, and Complainant and Respondent agree that entry of this Complaint and Consent Agreement without further litigation is the most appropriate means of resolving this matter.

46. This Complaint and Consent Agreement, upon incorporation into a Final Order, applies to and is binding upon EPA and upon the Respondent and Respondent's employees.

47. This Complaint and Consent Agreement contains all terms of the settlement agreed to by the parties.

### **Civil Penalty**

48. Pursuant to section 309(g) of the CWA, 33 U.S.C. § 1319(g), EPA has determined that an appropriate civil penalty to settle this action is thirty-eight thousand dollars (\$38,000.00).

49. Respondent consents, for the purpose of settlement, to the issuance of a Complaint and Consent Agreement and to the payment of the civil penalty cited in the foregoing paragraph.

50. Pursuant to 31 U.S.C. § 3717, EPA is entitled to assess interest and penalties on debts owed to the United States and a charge to cover the cost of processing and handling a delinquent claim.



51. In addition, a handling charge of fifteen dollars (\$15) shall be assessed the 61st day from the date of the final order, and each subsequent thirty day period that the debt, or any portion thereof, remains unpaid. In addition, a six percent (6%) per annum penalty shall be assessed on any unpaid principal amount if payment is not received within 90 days of the date the Final Order is issued. Payments are first applied to outstanding handling charges, 6% penalty interest, and late interest. The remainder is then applied to the outstanding principal amount.

52. Respondent agrees that this penalty shall never be claimed as a federal or other tax deduction or credit.

53. Within sixty (60) calendar days of receipt of the Final Order issued by the Regional Judicial Officer, Respondent shall pay the agreed upon civil penalty of thirty eight thousand (\$38,000.00) by remitting a cashier's or certified check for that amount, payable to "Treasurer, United States of America," to:

Regular Mail:

Mellon Bank  
Lockbox 360859  
Pittsburgh, PA 15251-6859

Federal Express, Airborne, or other commercial carrier:

U.S. EPA, 360859  
Mellon Client Service Center Room 154-0670  
500 Ross Street  
Pittsburgh, PA 15251-6859

Wire transfers must be sent directly to the Federal Reserve Bank in New York City with the following information:

ABA = 021030004  
TREAS NYC/CTR/

BNF=/AC-68011008

The check shall reference the Respondent's name and facility address and the EPA Docket

Number of this action. A copy of the check shall be sent simultaneously to:

Ms. Tina Artemis  
Regional Hearing Clerk, Mail Code: 8RC  
U.S. EPA Region 8  
999 18th Street, Suite 300  
Denver, Colorado 80202-2466

and

Marc Weiner  
Enforcement Attorney, Mail Code 8ENF-L  
U.S. EPA, Region 8  
999 18th Street, Suite 300  
Denver, Colorado 80202-2466

#### **General Provisions**

54. This Complaint and Consent Agreement shall not relieve Respondent of the obligation to comply with all applicable provisions of federal, state or local law.

55. Failure by Respondent to comply with any of the terms of this Complaint and Consent Agreement shall constitute a breach of the agreement and may result in referral of the matter to the Department of Justice for enforcement of this agreement and for such other relief as may be appropriate.

56. Nothing in this Complaint and Consent Agreement shall be construed as a waiver by the U.S. EPA of its authority to seek costs or any appropriate penalty associated with any collection action instituted as a result of Respondent's failure to perform pursuant to the terms of this Complaint and Consent Agreement.

57. Each undersigned representative of the parties to this Complaint and Consent Agreement certifies that he or she is fully authorized by the party represented to execute and bind the parties to its terms and conditions.

58. The parties agree to submit this Complaint and Consent Agreement to the Regional Judicial Officer with a request that it be incorporated into a Final Order.

59. This Agreement, upon incorporation into a Final Order by the Regional Judicial Officer and full satisfaction by the parties, shall be a complete, full and final settlement of the violations alleged in this Complaint and Consent Agreement.

60. This Complaint and Consent Agreement resolves Respondent's liability for federal civil penalties under sections 309(g) of the CWA, 33 U.S.C. § 1319(g), for the alleged violations contained herein. This Complaint and Consent Agreement shall not in any case affect EPA's right to pursue appropriate injunctive or other equitable relief or criminal sanctions for any violations of law.

61. Each party shall bear its own costs and legal fees in connection with all issues associated with this Complaint and Consent Agreement.

GOSNEY AND SONS, INC.  
Respondent

Date: 6/12/06

By: **SIGNED**  
**PRESIDENT**

U.S. ENVIRONMENTAL PROTECTION AGENCY  
REGION 8, Complainant

Date: 6/16/06

By: MICHAEL T. RISNER for/  
Carol Rushin  
Assistant Regional Administrator  
Office of Enforcement, Compliance,  
and Environmental Justice

Date: 6/15/06

By: SIGNED  
Michael T. Risner, Director  
David Janik, Supervisory Attorney  
Legal Enforcement Program  
Office of Enforcement, Compliance,  
and Environmental Justice

Date: 6/15/06

By: SIGNED  
Marc Weiner, Enforcement Attorney  
Legal Enforcement Program  
Office of Enforcement, Compliance,  
and Environmental Justice

## CERTIFICATE OF SERVICE

The undersigned certifies that the original of the attached **COMPLAINT/CONSENT AGREEMENT/FINAL ORDER** in the matter **GOSNEY and SONS, INC., BAYFIELD PIT, DOCKET NO.: CWA-08-2006-0029** was filed with the Regional Hearing Clerk on June 21, 2006.

Further, the undersigned certifies that a true and correct copy of the document was delivered to Marc Weiner, Enforcement Attorney, U. S. EPA – Region 8, 999 18<sup>th</sup> Street, Suite 300, Denver, CO 80202-2466. True and correct copies of the aforementioned document was placed in the United States mail certified/return receipt requested on August 7, 2006 to:

Mark Mathews, Esq.  
Brownstein, Hyatt & Farber, P.C.  
410 Seventeenth Street  
Twenty-Second Floor  
Denver, CO 80202-4437

And

U. S. Environmental Protection Agency  
Cincinnati Finance Center  
26 W. Martin Luther King Drive (MS-0002)  
Cincinnati, Ohio 45268

August 7, 2006

Eduardo Perez for/  
Tina Artemis  
Regional Hearing Clerk

**THE COMPLAINT AND CONSENT AGREEMENT WAS FILED IN THE REGIONAL HEARING CLERK'S OFFICE ON JUNE 21, 2006. THE FINAL ORDER WAS FILED ON AUGUST 8, 2006.**

*Printed on Recycled Paper*



